applicant sought to make between provisions as to maintenance and those as to distribution, but reference to the reports does not support that view.

Although it might be proper in some cases to treat references to illegitimate children in English Law as applicable to adopted children here, I do not think it could be properly argued that that substitution should be made in every case. The position of adopted children is not the same as that of illegitimate children more especially in respect of this matter of maintenance. An illegitimate child in England is considered as having no relatives and can look for maintenance to the putative father alone. We are not here concerned with the Chinese Law, but an adopted child under the English Act or under the local ordinance retains rights in his family of birth. There is nothing before me in this case to show that the applicant here has either obtained any right of maintenance against his adopted father, or has lost any rights of succession to his natural father. Nor can any conclusive arguments be based on a consideration of the rights of the parties apart from the Will; for the whole purpose of the Will is to vary the rights which would have existed upon an intestacy. Moreover there is in Counsel's arguments an ambiguity in the use of the word "maintenance". In considering what the Counsel describes as the testator's scheme we must have some regard to the testator's circumstances. At the time when this Will was made the youngest son Teo Beng Teng was two years of age and the applicant in this case was nineteen years of age. The date of distribution at that time was twenty-eight years distant, and there is, in my opinion, no analogy at all between an illegitimate child's right of maintenance, which is limited both as to the amount, and as to the age up to which it can be claimed, and the applicant's claim here to receive maintenance until he attains the age of forty-seven by which time as a Chinese he might have married several wives and begotten a number of children.

The applicant's argument is based on an assumption in his own favour as to what the intention of the testator was. The intention of the testator must however be deduced from the very words of the Will itself. This is an English Will carefully drawn by a Solicitor and showing throughout a recognition of the distinction between natural and adopted children and using language carefully selected to indicate which of these are intended. Wherever an adopted child is intended or included that word is used, and this is so even in clause 18 when he is dealing with remainders over and speaks of adopted child. On the other hand when he is referring to his natural sons he uses the word "son" and omits the word "natural". Reading the Will and construing it as a whole it would I think be quite wrong for me to read into clause 2 before the word "children" the words "natural or adopted" which the testator has himself inserted wherever it may be supposed intended both classes of children to be included.

The applicant's request for costs out of the estate is opposed. The trustees have never been in any doubt, and have throughout resisted his claim. The general rule is that a legatee's claim being dismissed he is not entitled to his costs though there be some ambiguity in the will requiring application to the court for its construction. I see no reason to vary that rule in applicant's favour.

The answer to the question propounded is that "children" does not include adopted children in clause 2 of the Will, and the costs of the application should be paid by the applicant.

Order accordingly.

In re JAYNA MOHAMED ISMAIL MARICAR (deceased); MOHAMED HUSSAIN MARICAR AND ANOR. v. AHAMAD BEE BINTE ISMAIL MARICAR AND 3 ORS.

[Orig Civ. Juris. (Evans, J.) July 5, 1950]

[Singapore — Originating Summons No. 226 of 1949]

Will — Period of vesting of gifts under will — Contingent or vested gifts — Whether provision is void for remoteness or uncertainty.

Clause 12 of the will of J. M. Ismail Maricar (deceased) after providing for the formation of a residuary trust fund provided that at the end of the period of twenty-one years from the death of the testator his trustees should sell or dispose of all his moveable or immoveable property and distribute the proceeds thereof "among the beneficiaries entitled thereto according to Mohammedan Law including my said adopted son Mohamed Hussain and my said adopted daughter Salmah Bee as though they were my real or natural son and daughter." Clause 14 of the said will then went on to provide:— "Provided always that if any of my child or children whether by birth or by adoption in this clause mentioned shall have died in my lifetime or before the date of distribution leaving children or a child who shall be living at the date of distribution and attain the age of twenty-one years and be solvent then and in every such case the last mentioned children or child shall take and if more than one in equal shares, the share which his or her or their parent would have taken under this provision if such parent were living at the date of distribution." In this Originating Summons the plaintiffs, who were the trustees of the will of the testator, applied (inter alia) for the determination of the questions (1) whether the gifts under clause 14 of the will to the grandchildren of the testator (being the children of such of the testator's child who has died before the date of distribution) are

void for remoteness or uncertainty or otherwise and alternatively; (2) whether in the events that have happened clause 14 of the above-mentioned will is inoperative and of no effect inter alia for the reason that no grandchild can attain the age of twenty-one (21) years at the date of distribution.

Held, (1) that the gifts of the residuary shares under clause 12 of the will were contingent, as the residuary fund contemplated could not be identified until the date of distribution and that the heirs according to Mohammedan Law are to be ascertained at the period of distribution; (2) that clause 14 contained but one condition to vesting, that the grandchild should be alive at the date of distribution, and that the provisions as to majority and solvency are only directions as to payment; (3) that clause 14 is not therefore void for remoteness or uncertainty, nor yet inoperative, and that the persons entitled under clauses 12 and 14 are to be ascertained at the date of distribution.

Cases referred to :—

(1) *Boughton v. Boughton* 1 H.L.C. 406.

(2) *Miller v. Huddlestone* 3 McN. & G. 513.

(3) *In re Haji Tamby* (1932) M.L.J. 46.

ORIGINATING SUMMONS.

Eric Choa for the plaintiffs (trustees).

C. J. Koh for the first defendant.

Ahmad Ibrahim appointed to represent the grandchildren.

Evans, J. : — The only questions remaining on this summons are :—

(1) (a) Whether the gifts under clause 14 of the will to the grandchildren of the testator (being the children of such of the testator's child who has died before the date of distribution) are void for remoteness or uncertainty or otherwise;

Alternatively.

(b) Whether in the events that have happened, clause 14 of the above-mentioned will is inoperative and of no effect inter alia for the reason that no grandchild can attain the age of twenty-one (21) years at the date of distribution.

(2) If the answers to both the above questions are in the affirmative, whether on the true construction of the will the persons entitled to distribution under clause 12 thereof should be ascertained as at the date of death of the testator or at the date of distribution.

The clause referred to is a proviso only, and reads as follows :—

"14. Provided Always that if any of my child or children whether by birth or by adoption in this clause mentioned shall have died in my lifetime or before the date of distribution leaving children or a child who shall be living at the date of distribution and attain the age of twenty-one years and be solvent then and in every such case the last mentioned children or child shall take and if more than one in equal shares, the share which his or her or their parent would have taken under this provision if such parent were living at the date of distribution."

Mr. Eric Choa appeared for the trustees, Mr. C. J. Koh represented the defendant Ahamad Bee, and what were called the income beneficiaries, and Mr. Ahmad Ibrahim represented the grandchildren. One, Chee, did not appear but her interest was said to be exactly the same as the defendants. Mr. Koh argued that the proviso was contrary to the rule against perpetuities and was a contingent gift to grandchildren on their attaining twenty-one years, and referred to the rule that early vesting is favoured. Mr. Ahmad Ibrahim contended that paragraph 12 governed the distribution, but did not go on to examine that paragraph. Paragraph 14 he said contemplated one contingency: being alive; solvency could not be regarded as one for special provision is made therefor in paragraph 15. The will must be construed as a whole, and few references were made to other paragraphs nor were those made clearly accurate. The affidavits did not give a clear idea of what had been done. I did not think the argument touched on all considerations and reserved the questions for further consideration.

The will is a peculiar one. Unless the property was of a very unusual character the early clauses are unimportant. Clause 8 contains gifts of annuities and is the first of substantial gifts. The donees are those referred to as income beneficiaries, but that term, if not inaccurate, is at least misleading. They are two wives, children, adopted children, sister, half sister, and the woman Chee already mentioned who is described as mistress, but what that can mean in the mouth of a Moslem would have seemed to require considerable explanation. The annuities given vary in amount, but they also differ in kind most being for twenty-one years certain, but those to the sister and half sister for that period or for life whichever be less. These annuities are absolute gifts, and not here charged on any fund.

Clause 11 gives the executors a special power of sale over one house, the Jubilee Theatre, out of the immoveable property of the estate, with a discretion to postpone such sale.

Clause 12 is the first and only gift to trustees, and is of property clearly divided into realty and personalty subject to the one preceding power to sell and convert. This clause thus creates a personalty fund created by sale of all movable property, and, if necessary, by sale of the Jubilee Theatre. From this fund supplemented by income of immoveables the debts and expenses were to be paid and the annuities were to be purchased, or paid. The words are quite clear :—

"12. I devise and bequeath all the rest and residue of my moveable and immoveable property whatsoever and wherever situate unto my Trustees upon trust to retain the immoveable property in the same investments or property in which the same may be at the time of my decease and to sell and convert into money the moveable property or such part thereof as shall not consist of money with power also in their discretion to sell or dispose of by public auction or private treaty with power also to postpone such sale or sales and conversion for such time as they may think expedient and out of the

money produced by such sale or sales calling in and conversion and out of the ready money and also out of the income produced by my investments and immoveable property to pay my funeral and testamentary expenses, debts, legacies and monthly sums bequeathed by this my Will and to invest the residue of the said moneys in manner hereinafter mentioned and to stand possessed of the residue of the said moneys and the investments for the time being representing the same and of the other investments and property (hereinafter called the residuary trust fund) upon trust for a period of twenty one years from the date of my death to accumulate the income thereof by investing the same and the resulting income thereof in manner hereinafter mentioned. All the accumulations shall be added to the residuary trust fund and follow the destination thereof and at the end of the said period of twenty-one years (hereinafter referred to as the date of distribution) my trustees shall sell or dispose all my moveable or immoveable property whatsoever or wherever situated and distribute the proceeds thereof among the beneficiaries entitled thereto according to Mohammedan Law including my said adopted son Mohamed Hussain and my said adopted daughter Salmah Bee as though they were my real or natural son and daughter."

It is also clear that, in the testator's reckoning, the fund so created, and annually supplied, would be ample to pay all outgoings charged on it, and that there would be an accumulable balance annually. No shortfall is contemplated, but should it occur all bequests charged on this fund would have to be rateably reduced. *Boughton v. Boughton*[1] and *Miller v. Huddlestone*[2].

The will then goes on to create a second fund which is called the "residuary trust fund" which is unascertainable at the date of death being the realty plus the accumulations over the ensuing twenty-one years. This is the subject of the later clauses. There is at once, a striking difference in the distribution; with the addition of adopted children, the Moslem rules are to be followed, while the amounts of the annuities vary, on the other hand, considerably and are quite arbitrary. There is no connection between the two distributions whatever. Those numerous cases in which there is a gift of shares in a corpus, and of shares in the interim income of those shares, have no application here at all. There are here, at best, different funds, distributed at different times, but the annuities are more properly regarded as wholly independent gifts. For these same reasons, and because the residuary fund contemplated could not be identified until the date of distribution, the gifts of shares therein must be regarded as contingent.

This gift of shares is to "the beneficiaries entitled thereto according to Mohammedan Law including my said adopted son Mohamed Hussain and my adopted daughter Salmah Bee." Counsel referred to *In re Haji Tamby*[3] in which there was a gift to "my heirs as then ascertained according to Mohammedan Law", and distinguished this case. It is true that the date of ascertaining the heirs is there expressly defined, but, for the above reasons, and on what seems to me the proper construction of paragraph 14, there appears to be no doubt as to the date which the testator contemplates, and to which he here refers. It is the date of distribution.

No Moslem law was proved, apart from reference to *Sir Roland Wilson's* book. I understood Mr. Ahmad Ibrahim to argue that one effect of paragraph 14 would be to exclude the widows of sons, but it is not quite clear to me how this could be, unless an interest had vested in the deceased son, so that the argument would appear to depend on a *petitio principii*. Paragraph 14 is a proviso, but, contrary to grammar and sense, is separated by paragraph 13 from the matter to which it applies, and to which it is applied by Mr. Ahmad Ibrahim. It does not read like a gift over, but like a substitution, and would seem to be inserted to prevent grandchildren being excluded by the existence of nearer heirs in the children. Between the dates of will and of death a wife or child might have died, and, in the twenty-one years more which elapse before the date of distribution, this chance is greatly increased. The widow's "share", and that of the child without issue will never vest, but will swell the fund available for the survivors. When listening to Mr. Ahmad Ibrahim I hesitated to accept his argument that paragraph 14 contained but one condition to vesting *i.e.* that the grandchild was alive at the date of distribution. That argument seemed to have nothing to recommend it but that it would save the disposition. The grammar is, however peculiar. Had the testator intended three contingencies, he would more properly have written "who shall be living at the date of distribution and shall then have attained the age of twenty-one years...". The contingency of solvency may be said to be of less importance in that special provision is made therefor, but again the words might better be "and shall then be solvent". The "then" actually used is not temporal but consequential. There is therefore in the actual wording a clear break at "attain". The will clearly does not require that the grandchild shall have attained twenty-one years; "attain" may be future but there is no apparent reason to postpone vesting. Taking into consideration, in addition, the great importance which would attach to the date of distribution in the construction here given to the provisions generally, I now think Mr. Ahmad Ibrahim's construction must be taken as the correct one, and the alleged contingency of majority should be read as a direction as to payment. The terms of

paragraph 15 leave no doubt that the question of solvency can only arise at the date of distribution.

This proviso must thus be read, as a proviso normally is read, as a variation of the prior provision securing the interests of orphan grandchildren, and thus further defining the class of beneficiaries taking at once and at the only date of vesting.

The answers to the questions set out are that paragraph 14 is not void for remoteness or uncertainty, nor yet inoperative, but the persons entitled under paragraphs 12 and 14 are to be ascertained at the date of distribution.

Order accordingly.

REX v. LIM KIAN SOO.

[App. Crim. Juris. (Murray-Aynsley, C.J., Evans and Storr, JJ.) July 6, 1950]

[Singapore — Special Case No. 2 of 1950]

Road Traffic Ordinance, 1941, s. 48(2) — Disqualification of driver unless the Court for special reasons thinks fit to order otherwise — Nature of discretion.

This was a special case under the Road Traffic Ordinance in which the learned Magistrate asked for guidance on the interpretation of section 48(2) of the Ordinance. This sub-section provides for the punishment of those who use or let others use motor vehicles whilst not covered by third party insurance and after providing for the punishment it added "and a person convicted of an offence under this section shall (unless the Court for special reasons thinks fit to order otherwise . . . . . .) be disqualified etc." In the English case of Whittal v. Kirby (1) which was referred to, the Lord Chief Justice said that "a circumstance peculiar to the offender as distinguished from the offence is not a 'special reason' within the exception".

Held, that there is a discretion given to the Courts and that this should be exercised after taking into consideration the special circumstances of the case. Such a discretion should not be fettered and the Appellate Court should not intervene unless the discretion was not judicially exercised or unless the Magistrate in directing himself ignored some provision of the Ordinance.

Cases referred to :—

(1) *Whittal v. Kirby* (1948) K.B. 194.
(2) *Rex v. Cressan* (1939) N.I. 106.
(3) *Quelch v. Collett* (1948) 1 All E.R. 252.
(4) *Bracegirdle v. Oxley* (1947) 1 K.B. 349.
(5) *Reay v. Young and anor.* (1949) 1 All E.R. 1102.

SPECIAL CASE.

E. P. Shanks for the Crown.

M. Abraham for the accused.

Murray-Aynsley, C.J. : — This is a special case under the Road Traffic Ordinance, No. 17 of 1941. The learned Magistrate seeks guidance on the interpretation of part of section 48(2). This sub-section provides for the punishment of those who use or let others use motor vehicles whilst not covered by third party insurance. After providing in the usual way for fine and imprisonment the Ordinance adds "and a person convicted of an offence under this section shall (unless the Court for special reasons thinks fit to order otherwise . . . . .) be disqualified etc." A similar discretion is given to Courts in other parts of the Ordinance in similar terms. I think that the same meaning must be given to the words wherever they occur.

The same words are used in Imperial Acts and have received interpretation in the Courts of England, Scotland and Northern Ireland. Unfortunately only the English cases are available here.

The question is fully dealt with in *Whittal v. Kirby*(1). It has to be considered whether this Court should follow that case which is, of course, only of persuasive authority so far as we are concerned.

The gist of the decision is contained in a passage which originally formed part of a lecture given by Lord Goddard to some country justices. It was adopted by the High Court of Northern Ireland in the case of *Rex v. Cressan*(2) which decision had in its turn the approval of Lord Goddard and others sitting in a Divisional Court. "A 'special reason' within the exception is one which is special to the facts of the particular case, that is, special to the facts which constitute the offence. It is, in other words, a mitigating or extenuating circumstance, not amounting in law to a defence to the charge, and one which the Court ought properly to take into consideration when imposing punishment. A circumstance peculiar to the offender as distinguished from the offence is not a 'special reason' within the exception." (At p. 112).

I personally think that the form in which that statement is made is open to objection. I think that it cuts down the discretion given to Courts when it limits 'special circumstances' in this way. Mitigating circumstances in a case may be of either kind.

In my opinion Courts, when approaching the question, should begin by remembering that if they find the circumstances sufficient in one case they must make a like finding in all like cases.

The word 'special' is the antonym of the word 'general' which would mean the circumstances that would be present in every case under the section. But, if they find circumstances 'special' for the purpose of mitigation which are found in a large percentage of